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FILED
JUL 11 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 991

PETER WYLAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

Motion to Dismiss and Argument and Points and Authorities in Support Thereof.

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PAGE

SUBJECT INDEX

Page

Argument and Points and Authorities 3

I.

The California Supreme Court has accepted the specific portion of Penal Code 650½ which is the subject of this appeal as valid and directed at sexual matters in the criminal law 3

II.

Section 650½, "which openly outrages public decency", is not vague and uncertain as to its purpose, but is specifically directed at the control and regulation of the criminal aspects of sexual activity not otherwise specifically made punishable by other Penal Code sections 7

III.

The California Supreme Court occupies a position of appellate authority over all of the other courts within the state, including the various branches of the state District Court of Appeal 8

IV.

We believe the District Court of Appeal should have drawn a distinction between statutory unconstitutionality, and the unconstitutional application of the statute, since in this manner only can true justice ever be attained 9

V.

Section 650½ of the California Penal Code, and more particularly, the prohibition here under consideration, is not vague and uncertain within the judicial holdings pertaining to that area of statutory interpretation, and should not be construed as void 10

VI.

Conclusion 12

TABLE OF AUTHORITIES CITED

Cases	Page
Connally v. General Construction Co., 269 U.S. 385	10, 11
Hunt v. State, 195 Ind. 585, 146 N.E. 329	10
Lane, In re, 58 Cal. 2d 99, 372 P. 2d 897	5, 6, 7
Moss, In re, 58 Cal. 2d 117, 373 P. 2d 425	3, 4, 7
State ex rel. Crow v. West Side R. Co., 146 Mo. 155, 47 S.W. 959	10
Whitney v. Municipal Court, 58 Cal. 2d 907, 377 P. 2d 80	7

Rules

California Appellate Rules, Rule 28	8
California Appellate Rules, Rule 29	8

Statutes

California Penal Code, Sec. 314(2)	6
California Penal Code, Sec. 650½	2, 3, 6, 7, 9, 11, 12

IN THE

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PETER WYLAN,

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PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS.

Appellant's Petition for Rehearing, on Appeal From the Appellate Department of the Superior Court for the County of Los Angeles, State of California.

Appellee respectfully requests this Court to dismiss Appellant's Petition for Rehearing from its *per curiam* decision, dated May 23, 1966, dismissing his appeal on the ground of want of jurisdiction. This motion is based upon the belief that the recent ruling of the California District Court of Appeal, Second District, in the case of *In re Davis*, Criminal No. 11822, reversing the Appellate Department of the Superior Court, County of Los Angeles, State of California, is in direct conflict with the views of the California Supreme Court on the same phrase and prohibition of the same statute, and therefore, itself subject to reversal by that court.

It is true that a department of the California District Court of Appeal, Second District, has reversed the Appellate Department of the Superior Court, Los Angeles County, in the *Davis* case which is the subject of Appellant's Petition for Rehearing. It is alleged also to be true that Respondent in that case is in the process of perfecting an appeal from that decision. In the interim, we propose to be guided by the expressed view of the California Supreme Court *in re* Section 650½ of the Penal Code of the State of California.

ARGUMENT AND POINTS AND AUTHORITIES.

I.

The California Supreme Court Has Accepted the Specific Portion of Penal Code 650½ Which Is the Subject of This Appeal as Valid and Directed at Sexual Matters in the Criminal Law.

In those recent cases in which the California Supreme Court declared it unconstitutional for cities and counties to enact local ordinances for the control of prostitution and sexual promiscuity, the justices reviewed all of the State Penal Code Sections considered pertinent and applicable, analyzed and listed those which dealt with the criminal aspects of sex, indecent exposure, and obscene exhibitions, and concluded that the State Legislature had occupied the field.

One of those state statutes, Penal Code Sec. 650½, and more particularly the very wording under consideration here, was repeatedly accorded a position of prominence in the reasoning and discussion of the court:

I quote from *In re Moss* (July, 1962), 58 Cal. 2d 117, 373 P. 2d 425, at page 119:

> "Section 650½ of the Penal Code now provides, and provided at the time of the commission of the alleged offense, in part: 'A person who wilfully and wrongfully commits any act . . . *which openly outrages public decency* . . . is guilty of a misdemeanor.' (Emphasis ours.)

The Supreme Court then states:

> "A reading of the above quoted sections of the Penal Code shows clearly that the state had occupied the field with regard to the criminal as-

> pects of indecent exposure and obscene exhibitions. Accordingly, a city ordinance attempting to make certain acts of exposure and exhibition criminal is in conflict with the state law and is void."

Certainly the District Court of Appeal is not now asking us to believe that the Justices of the Supreme Court rendered a decision of such grave and far reaching consequences to the people of this most populous state without determining the validity of the statutes they quoted and relied upon to deprive the political subdivisions of their traditional police power in the field of sexual promiscuity. A void statute would be no statute at all. It must follow then that if the state law were indeed unconstitutional the Supreme Court was in error in its conclusion that local ordinances "in conflict therewith were void." We cannot accept this indictment of that high court.

Pursuing the point even further, Justice White, in a concurring opinion, stressed the careful consideration given the entire matter by the justices. I quote from page 120 of the *Moss* case, cited *supra:*

> "However, in the case now before us, I am satisfied that by the very language of subdivision 2 of Penal Code Sec. 314, making it unlawful for any person '. . . to make any other exhibition of himself to public view or the view of any number of persons, *such as is offensive to decency,* or is adapted to excite to vicious or lewd thoughts or acts . . .' 'and in section 650½ of the Penal Code making it a misdemeanor for any person to com-

> mit any act . . . *which openly outrages public decency* . . .' the Legislature has manifested a clear intention to occupy in its entirety the field in which the City of Los Angeles sought to legislate." (Emphasis ours.)

Nor can it be overlooked that he concludes with this statement:

> "We are not here confronted with an ordinance which involves new and additional regulations in aid and furtherance of the general law, as did the ordinance under consideration in the case of In re Lane, but with an ordinance which punishes exactly the same act denounced by a state law. It is, consequently, in conflict therewith and therefore, to that extent, void. (*In re Mingo*, 190 Cal. 769, 771; 214 P. 850."

How could an ordinance be "in conflict therewith and therefore void" if the statute itself were void?

Let us examine the *Lane* Case. Certainly it cannot be overlooked that in that landmark case in the field of sexual promiscuity, *In re Lane* (June, 1962), 58 Cal. 2d 99; 372 P. 2d 897, the California Supreme Court studied and analyzed with meticulous care and in great detail, and commented upon and listed as valid a vast number of state statutes dealing with the various aspects of criminal law control of sexual activity and obscene and indecent activity in direct relation thereto, in depriving cities and counties of their historical police authority in the field. And there again, the challenged

wording of Penal Code Section 650½ is given a place of prominence:

I quote from page 103, of the *Lane* case:

". . . and 650½ (*acts against public decency*) . . ."

And again from page 104:

". . . (See, e.g. Penal Code Sec. 647, subds. (a), (d)) (Lewd or dissolute conduct in a public place); sec. 314 (indecent exposure and obscene exhibitions); and *sec. 650½ (acts against public decency)*" (Emphasis ours.)

In re Lane is a landmark case in this state, and it could not have been the result of indifferent analysis of the statutes involved. No less than seventy County Counsels, District Attorneys, City Attorneys, and the Attorney General of the State appeared *Amici Curiae* on behalf of the Respondent (City of Los Angeles).

In that case the Supreme Court held:

"A local municipal ordinance is invalid if it attempts to impose *additional requirements* in a field that is preempted by the general law." (Emphasis ours.)

If Sec. 650½, "*which openly outrages public decency*" is indeed void for uncertainty, then Penal Code Section 314, subd. 2, ("*such as is offensive to decency*") is void for the same reason, and thus a substantial portion of the state law upon which the *Lane* decision rests is void. How then can it be said that the ordinance was invalid because it attempted to impose *additional requirements*?

II.

Section 650½, "Which Openly Outrages Public Decency", Is Not Vague and Uncertain as to Its Purpose, but Is Specifically Directed at the Control and Regulation of the Criminal Aspects of Sexual Activity Not Otherwise Specifically Made Punishable by Other Penal Code Sections.

I quote from Chief Justice Gibson's separate concurring opinion in the *Lane* case. At page 110:

> "The analysis made in Justice McComb's opinion of the Penal Code provisions *relating to the criminal aspects of sexual intercourse* demonstrates that the Legislature has established a comprehensive general scheme *with respect to this subject* and has occupied the entire field." (Emphasis ours.)

How, in the face of these clear pronouncements as to the unmistakable purpose of the Legislature in enacting the challenged wording of Penal Code Section 650½, by the highest court of the State, could the lesser appellate court profess ignorance and confusion as to its meaning? We can only conclude that they became momentarily lost in the fascinating game of intellectual roulette.

As if to make its position even more clear, in an even later case than *Moss* or *Lane,* the California Supreme Court has considered again, and accepted the validity of, and the meaning and purpose of that portion of Penal Code Section 650½ under attack by appellant in this petition. I refer to *Whitney v. Municipal Court* (Dec. 1962), 58 Cal. 2d 907, 377 P. 2d 80 at page 910:

> "Section 650½ of the Penal Code now provides, and provided at the time of the commission of the

alleged offense, in part: 'A person who wilfully and wrongfully commits any act . . . *which openly outrages public decency* . . . is guilty of a misdemeanor.' 'A reading of the above quoted sections of the Penal Code *shows clearly* that the state had occupied the field *with regard to the criminal aspects of obscene exhibitions.*'" (Emphasis ours.)

III.

The California Supreme Court Occupies a Position of Appellate Authority Over All of the Other Courts Within the State, Including the Various Branches of the State District Court of Appeal.

Rule 28, California Appellate Rules. Hearing in Supreme Court:

"(a) Time within which court may grant hearing. Within 30 days after a decision of a District Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision (b) may order the cause transferred to itself for hearing and decision, and . . ."

Rule 29: Grounds for Hearing in the Supreme Court:

"(a) Grounds. A hearing in the Supreme Court after decision by a District Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decisions or the settlement of important questions of law, (2) where the District Court of Appeal was without jurisdiction of the cause; . . ."

IV.

We Believe the District Court of Appeal Should Have Drawn a Distinction Between Statutory Unconstitutionality, and the Unconstitutional Application of the Statute, Since in This Manner Only Can True Justice Ever Be Attained.

To declare a statute unconstitutional and void because one disapproves of its application in an isolated situation is to abandon the search for truth in the administration of justice. If the statute itself must stand or fall because in a given case one disapproves of the result, rather than the result itself being set aside as an unconstitutional application of an otherwise valid statute then invariably the guilty must repeatedly go free or the innocent suffer, according to the views of a particular court.

If such a judicial philosophy is permanently pursued it cannot help but result in an abandonment of the only worthwhile concept of justice under the law: The ascertainment of truth; the protection of the innocent; and the punishment of guilt.

With no intent to be disrespectful, it may indeed be that the District Court of Appeal in the *Davis* case rather than a failure to understand the wording of Section 650½, found its application incompatible with the facts. Men hold many views regarding the upper feminine torso. Some of them are artistic, some practical, some idealistic, and some are related to sexuality, but none of them encompass the obscene or indecent.

This, however, is not the case in the factual situation in Appellant's conduct, which did indeed outrage public decency, as prohibited by the legislature and defined by the California Supreme Court.

V.

Section 650½ of the California Penal Code, and More Particularly, the Prohibition Here Under Consideration, Is Not Vague and Uncertain Within the Judicial Holdings Pertaining to That Area of Statutory Interpretation, and Should Not Be Construed as Void.

> "A statute cannot be held void for uncertainty if any reasonable and practical construction can be given it. Mere difficulty in ascertaining its meaning, or the fact that it is susceptible to different interpretations, will not justify the courts in disregarding it. It is the duty of the courts to endeavor by every rule of construction to ascertain the meaning of, and give full force and effect to, every enactment of the legislature not obnoxious to constitutional prohibitions." *State ex rel. Crow v. West Side R. Co.*, 146 Mo. 159, 47 S.W. 959.

This case is cited in the extensive annotation of *Connally v. General Construction Co.*, 269 U.S. 385, which in turn is one of the authorities relied upon by the District Court of Appeal (California) in the *Davis* case. The *Connally* case, incidentally, on its facts and type of statute involved, can have little comparative value in either the *Davis* or the instant case. It is, however, of great value because of its exhaustive consideration of cases in the field of statutory uncertainty.

> "A court will not nullify an enactment of the legislature because the language used is indefinite in some particular, if the purpose or intent of the Legislature can be ascertained." *Hunt v. State*, 195 Ind. 585; 146 N.E. 329.

We respectfully submit that the District Court of Appeal, California, Second District, could very easily have ascertained both the purpose and the intent of the Legislature in enacting Section 650½ of the Penal Code of this state. The Supreme Court had in fact, already resolved the matter for them.

Justice Sutherland says, at page 329, of the *Connally* case:

> ". . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. *The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue.*" (Emphasis ours.)

Certainly it is glaringly apparent that Section 650½ of the California Penal Code meets that test. The District Court of Appeal, in the *Davis* case, stipulates that the Appellants there not only knew of their prohibited conduct, but were irate because they were deprived of the publicity value of an actual arrest.

In the case before us here, one would have to be naive indeed, to take the position that Appellant did not know and could not be expected to know that his particular reprehensible conduct was an outrage to public decency, within the criminal aspects of sexual activity, obscenity, and exhibitionism, and immorality of the most flagrant sort, as defined by the California Supreme Court *in re* Section 650½ in the cases heretofore cited and discussed.

VI.

Conclusion.

We have deliberately refrained from any attempt to discredit the interpretation of the cases cited and the law relied upon in the *Davis* case by the District Court of Appeal. We do not wish to appear to challenge either the authority (within its legal limits) of that court, nor the wisdom of its justices. We simply feel it our duty to point out that it is a tribunal of secondary appellate authority within the state of California, and that we are advised positively by the attorney for the Respondent in the *Davis* case that he is at this moment preparing his brief on appeal to the California Supreme Court.

We believe further, from the cases already decided by that court that the probability of reversal of the District Court of Appeal in the *Davis* case should not be overlooked.

It appears to us that the District Court of Appeal, in its conclusion that Penal Code Section 650½, "openly outrages public decency" is unconstitutional for uncertainty, failed to consider and be guided by the views of the higher court.

We submit therefore, that the matter of constitutionality of Section 650½ of the California Penal Code should be left to the determination of the California Supreme Court, and we earnestly petition this Court to dismiss the petition of Appellant.

Respectfully submitted,

BYRON B. GENTRY,
Attorney for Appellee.

12

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